No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF SMALL BUSINESS OWNERS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curaie are small-business owners from widely varied industries. We are mural artists, farmers, ranchers, cheese-makers, and ecotourism entrepreneurs. Despite this diversity, we share common bonds: Each of us has a passion for our business, and an intimate familiarity with the provisions of the Endangered Species Act at issue in this case. From that common experience, we have drawn a common lesson: Environmental regulations like the ESA can provide economic benefits to business.

We write to make economic case for biodiversity and stewardship, and to protect Congress's broad grant of authority to the Fish & Wildlife Service to designate critical habitat for the protection of critically endangered species like the dusky gopher frog.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The challenge presented by Petitioner and its amici in this case follows a plot-line that is familiar to those who have been through past battles over species protection. Environmental regulation is portrayed as a "lopsided" zero-sum game where every marginal gain for species preservation produces "chilling" losses for business. Markle Resp. Br. 15; Br. of the Am. Farm Bureau Fed. *et al.* 3. Regulators like Fish & Wildlife Service are cast as

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[1] Petitioner and respondents have all lodged blanket consent letters with the court. No counsel for any party authored this brief in whole or in part, and no entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

thoroughgoing villains. They will, we are assured, be incentivized to pursue "'aggressive, tenuously based interference with property rights'" if the traditional understanding of the Service's authority to designate critical habitat is affirmed. Br. of Chamber of Commerce 15 (quoting Pet. App. 162a (Jones, J.)). We are likewise told that the Service will wield the consultation process needed to get a CWA permit—the only *conceivable* consequence of the designation at issue here—as a cudgel in a "regulatory shakedown," and will threaten to "prohibit all development" on Petitioner's property. Pet. Br. 44. And of course, "small businesses" are trotted out as the perpetual doe-eyed victims, Pet. Br. 16 n.10 (citing JA 28-31), forever subject to the whims of their regulatory oppressors, and fainting in the face even the most modest of species-preservation efforts.

Amici know every part of this caricature to be wrong. Amici fully understand that environmental regulations come with economic costs. But they also know that those regulations offer economic opportunities—often very great ones. Amici also know from personal experience that regulatory agencies are not entrenched opponents of business. More often they are valued partners, offering their considerable expertise to ensure that economic development and species preservation are pursued hand-in-hand.

The story told by Petitioner misses something even more fundamental too: All businesses, big and small, depend upon regulation to protect biodiversity, because biodiversity is economic bedrock. Every industry depends upon a biodiverse world to provide the insects that pollinate our food, the drugs to cure our diseases, and the trees we need to prevent catastrophic erosion, to provide

us with oxygen, and to scrub the atmosphere of excess carbon. We learn more every day about how every species loss chips away at that economic foundation—with each blow having the potential to produce catastrophic failures. Modest environmental regulation is thus essential to protect our entire economy from collapse.

Congress well understood this connection between the health of our ecology and that of the economy. That is why it took the long view with the Endangered Species Act, making species preservation, calculated according to an appropriately long timeline, an issue of the highest national importance. Congress recognized that when the habitat occupied by a species has proven inadequate to ensure its survival, the Service needs more flexibility, not less, in finding potential alternatives and designating them as critical habitat. The diverse challenges faced by critically threatened species require an equally diverse array of potential solutions, even if none is absolutely perfect. Congress also recognized that the long-term value of species cannot be captured on a simple balance sheet. For this reason, it put a hard stop on the ability of the Service to take economic considerations into account in making critical habitat designations when those economic considerations would threaten the ultimate survival of species. The Service stayed well within those well-marked boundaries in making the critical habitat designations at issue in this case, and the Court should not constrict them through the extratextual and unjustified judicial review that Petitioner seeks in this case.

ARGUMENT

I. Protecting endangered species provides significant economic benefits to small businesses.

Petitioner and its amici portray the interests of species preservation to be in perpetual conflict with the needs and desires of small businesses. But many of the owners of businesses actually impacted by environmental regulation like the ESA—especially the small businesses—have come to see that business and environmentalism can live in harmony. As amici's stories illustrate, this realization comes to different business owners in different ways. Some have discovered profitable business practices that stem directly from endangered species protection. Others have simply found profit in aligning the ESA's efforts at species conservation with their own beliefs about sustainability. Many rely on the continued availability of endangered species to sustain their businesses, whether to provide an attraction for tourists, a source of inspiration for great art, or simply to provide the undergirding for the entire economy. And most pragmatically of all, some have found that protection of species can protect the value of their property. Whatever their source, such epiphanies have caused business owners to conclude that biodiversity is good for business, and strong regulation is essential to protect biodiversity. And more are coming to that view all the time.

A. ESA regulations provide small-business opportunities.

A survey of executives from a variety of companies conducted by management consultants at McKinsey & Company in 2007 revealed a striking finding: 53% of those surveyed said their companies are taking action to

address today's biodiversity crisis.[2] This is because 59% of those surveyed have come to see biodiversity as more of a business opportunity than a public-relations risk. *Ibid.* This was a big change over the results from a similar survey conducted even three years before, in 2005, which found that only 29 percent saw business opportunities in climate change—an issue that occupied a similar position in the public debate at the time. *Ibid.*

Amici like Lance Kyle exemplify this shift. Lance owns Cascade Caverns, a caving attraction in the Texas Hill Country. A Central Texas Republican and a businessman all his life, Kyle never saw himself as an environmentalist. But he has come around to see the need for regulations like the ESA through his business. This is because Cascade Caverns boasts more than a spectacular network of caves. It also attracts abundant wildlife, including endangered species like the black-capped vireo, the golden-cheeked warbler, the cave ground beetle, and the Cascade Cavern Salamander—so called because it was discovered in one of the caves.

Kyle calls this threatened wildlife the "magic sauce" that makes his business successful. Online customer reviews frequently refer to the excitement of seeing the Cascade Cavern Salamander or other animals during their visits. And Kyle strongly believes that if those rare species were not protected under the ESA, they would no longer show up on his property, and neither would the customers that delight to see them.

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[2] McKinsey & Co., *The next environmental issue for business: McKinsey Global Survey Results* (Aug. 2010), <https://goo.gl/FZZbz6>.

Kyle has also found that the ESA protects more than the species themselves. He says the Act also protects the integrity of his property, helping him fend off harmful extraction or other development that would threaten his business. Accordingly, Kyle now finds himself a part of an ecotourism industry that not only supports those like Kyle that provide the attractions, but also sustains many other businesses such as hotels, clothing manufacturers, car rental companies, and restaurants.[3] That business is booming. According to the Service's 2016 survey, sportspersons spent $81 billion on hunting, fishing, and other activities during the year, while wildlife watchers spent another $75.9 billion.[4] That accounts for nearly one percent of the country's entire Gross Domestic Product, *ibid.*, and hundreds of thousands of good-paying jobs.[5] And as Kyle's experience shows, that industry depends upon the ESA.

The ecotourism industry is not the only one that depends upon the continued existence of endangered species. As amici illustrate, many artists and authors make

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[3] Population Reference Bureau, *Eco-Tourism: Encouraging Conversation or Adding to Exploitation* (Apr. 1, 2001), <https://goo.gl/Gtpo63>.

[4] U.S. Fish & Wildlife Service, *2016 National Survey of Fishing, Hunting and Wildlife-Associated Recreation* 5 (Apr. 2018), <https://goo.gl/9myL2U>.

[5] Defenders of Wildlife, *Economic Benefits of the ESA* 2 (*Economic Benefits of the ESA*), <https://goo.gl/UEsVJd> (noting that in 2006, wildlife watching accounted for more than 860,000 private-sector jobs).

protection of endangered species the very purpose of their business, and the source of their inspiration.

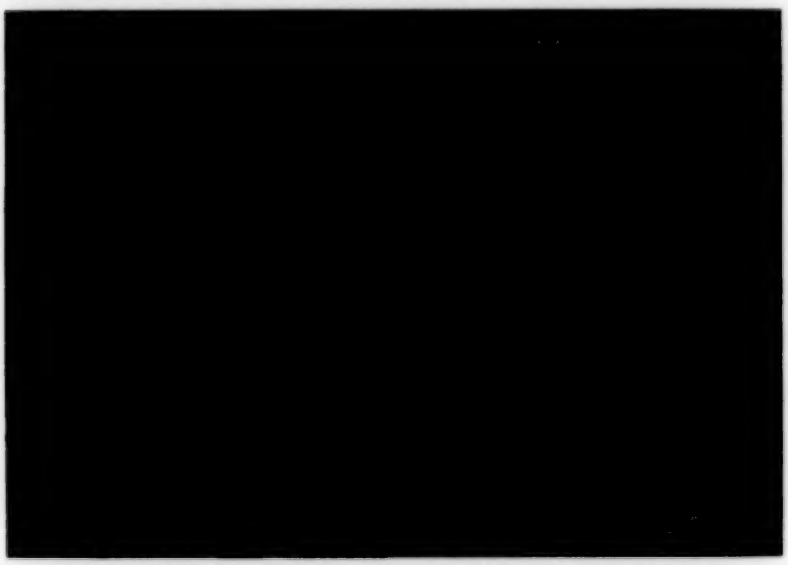
Susan Middleton is a wildlife photographer, author, and educator who has for many years made a living documenting the wonder of wildlife and endangered species. One of her recent books, *Archipelago*, co-authored by David Liittschwager, focused on the threatened marine creatures of the Northwestern Hawaiian Islands. One of her pictures of endangered species is included below. This bizarre, fragile creature is called a Blue Dragon Nudibranch:

Photo by D. Littschwager & S. Middleton ©2005.

Susan likes to focus on these smaller, lesser-known species to emphasize the essential role that even marginalized creatures play in ecosystems around the world. The power and emotional content of her work has made

it very popular, and it has also provided her a solid income, which she uses to fund other artistic projects and education efforts.

Jack Jeffrey of Hawaiian Birds, LLC also includes photography as part of his bird-watching business in Hawaii, which sees about 300 people a year. He estimates that 85 percent of his photography focuses on endangered species, like this Hawaiian Akepa, which is native to the last remaining old-growth forests on Hawaii Island.



Jack's photography also garners him a substantial living, which he uses to supplement his other income enough to bear the high cost of living in Hawaii.

Roger Peet is able to make a living through his talents painting murals. His work focuses on endangered and extinct species, such as this mural titled "Bear-

Shaped Hole"—painted on the side of a building located in the Laurel District of Oakland, California:

This painting depicts the California Grizzly Bear, an animal that figures prominently on the California State Flag, but tragically can no longer be found within in the state—a disturbing meditation on the profoundly felt effect of the animal's absence. Roger has similar projects all across the country, including in New York, Texas, Florida, and Arkansas.

Endangered species are also a source of inspiration for Rick Lamplugh, author of two best-selling books. The first, *In the Temple of Wolves: A Winter's Immersion in Wild Yellowstone*, focuses on the plight of the wolves that make Yellowstone home. The second, *Deep Into Yellowstone: A Year's Immersion in Grandeur and Controversy*, digs into other important controversies over protecting biodiversity and endangered species. So

deeply connected are Rick's writing career and his abiding respect for endangered species, especially wolves and grizzly bears, that he relocated from Oregon to Montana to be closer to the Greater Yellowstone Ecosystem. His deep connection to the natural world also motivated his appearance as an amicus in this case. Ever since *In the Temple of Wolves* reached the Amazon bestseller list, Rick has understood that he owes a debt to the wolves, and he wants to speak on the wolves' behalf—because they cannot speak for themselves.

For artists and authors like Susan, Jack, Roger and Rick, the ESA's protections for endangered species do more than secure the source of their lucrative businesses, they also protect the font of their inspiration and the pole that pulls their life's compass.

Other amici have obtained economic benefits even more closely tied to the ESA, because they flow directly from the ESA's environmental regulations.

Several amici have reported that the restrictions imposed by the ESA have protected their property by making it harder for neighboring properties to develop in ways that would harm their businesses. This includes Mary Falk of LoveTree Farmstead in Northern Wisconsin, whose symbolic commitment to sustainability is reflected in the farm's namesake symbol: two trees on the property that grew so closely together that their branches became intertwined over time. To Mary, these trees symbolize how agriculture and nature work together on her small farm, which devotes 100 acres to grazing lands for sheep, and another 100 acres to wildlife habitat.

The presence of protected birds on her property like bald eagles, osprey, and a blue heron rookery enabled the

farm to obtain status as a designated habitat, which allowed her community to fend off a proposed toxic ash dumb for chemical and medical waste that would have severely reduced her property's value and threatened the quality of the water she needs for her business.

In addition to obtaining advantages flowing from the ESA itself, Mary has realized that pursuing sustainability beyond what the law requires can also have remunerative benefits. She finds that her predator-friendly farming practices protect grazing grounds for her sheep, because the wolves she protects keep deer from overgrazing. And her efforts to reserve a wildlife corridor on the property—by restricting grazing to let her hayfields get older and thicker—have actually increased revenues on her cheese. Restricting grazing might reduce the volume of milk the farm gets from the sheep, but the practice increases the milk's complexity—because of the wider variety of wildlife, flowers, and insects that now leave their mark on the farm. Mary has found that the unique qualities of the sheep's milk allows the farm to sell higher-priced artisanal cheese. Together, these practices have allowed LoveTree Farmstead to survive even while many neighboring farms have closed. And thus while Mary cannot say the ESA has made her rich, it has allowed her to survive, raise three kids who still live in the community, and to enjoy the hunting, fishing, and recreational opportunities that come along with a healthy ecosystem.

Several other amici have taken part in programs maintained by the Service that turn environmental regulation into profitable enterprises. The Service and other agencies offer means by which business-owners can make money selling "mitigation credits"—arrangements under which one party agrees to permanently preserve

habitat for species to mitigate or offset losses to the species caused by another party's development.[6]

Dave Bugni created such a mitigation project on his small family forest in Oregon. Along with the forest's 85 acres of timberland, the property also has 0.8 miles of fish stream that is home to populations of threatened fish, such as coho salmon, winter steelhead, and cutthroat trout. His family undertook a stream restoration project on the property that aimed to improve fish passage by adding large woody debris structures, increasing the complexity of the creek, and thereby improving the habitat for the whole ecosystem. They also removed two large fish-blocking culverts beneath a nearby county road and replaced them with a new concrete bridge. Financing for these projects came from a variety of sources, including private grants as well as the blood and sweat of David's neighbors. But the bulk of the funding came from Portland General Electric, as mitigation for the relicensing for its hydropower plants. These habitat improvements not only made the stream habitable for the salmon, they also provided tangible benefits for the family's timber, by creating floodplains that retain water, thereby providing a buffer against drought.

The owners of the Connolly Ranch, located in California's San Joaquin and Alameda counties, have enjoyed the fruits of a similar arrangement with Safeway, Inc. The Ranch has been in the Connolly Family since 1872, and is now operated by Mark Connolly, Bridget Connolly,

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[6] U.S. Fish & Wildlife Service, *Working Together: Tools for Helping Imperiled Wildlife on Private Lands* 10 (2015) (*Imperiled Wildlife*), <https://goo.gl/q1PtUc>.

Katherine Connolly, and Celeste Garamendi. In 1991, the Ranch created a conservation easement on the property to protect the San Joaquin kit fox. That easement was purchased by Safeway to mitigate impacts from its construction of a new distribution center in the San Francisco Bay Area. In a win for all involved, the fox received permanent habitat protection on approximately 1,500 acres of the Ranch, Safeway was able to build its new distribution center, and the Ranch was able to pay off a great deal of accumulated debt on the property—debt that otherwise would have forced the Connolly family to sell off portions off the Ranch. The easement's modest restrictions allow the Connolly family to continue their profitable grazing and ranching operations on the property, just as they have done for the past 150 years. This positive experience with the ESA has led the Ranch to enter into other agreements to create preserves for other endangered species, such as the California tiger salamander and the California red-legged frog.

Ray McCormick is a soybean and corn farmer in Indiana and Illinois, who has done mitigation work with Duke Energy and other businesses to protect endangered species such as whooping cranes. He has also received direct subsidies under the ESA to build habitat for the Interior Least Tern. These efforts have allowed him to maintain a profitable farm alongside the migratory birds and other endangered species he is able to protect. He considers it a badge of honor to have protected endangered species on his property—a testament both to the value of his property and his concern for the diversity of life.

The credits obtained under these programs can be extremely valuable. Individual credits have been known

to trade at $100,000 or more. *Imperiled Wildlife*, *supra* note 6, at 11. And the global trade in such credits is expected to reach $10 billion a year by 2020.[7]

Other business owners have been able to parlay protection of endangered species into other kinds of economic opportunities. Indeed, while Petitioner has seen the humble dusky gopher frog as nothing but a hinderance to its business—slight and speculative as it might be—others have seen only opportunity. Take the creators of Tradition, a 4,800-acre planned community near the De Soto National Forest, near Biloxi Mississippi.[8] When they learned that part of their property was adjacent to Glen's Pond—the location of the gopher frog's last known population—would be within the critical habitat that the Service designated for the frog, 66 Fed. Reg. 62,993, 62,994-95 (Dec. 4, 2001), they did not file a lawsuit. AR4574, 4582. Instead, they supported the critical habitat designation, despite the fact that there were no reported sightings of the frog or evidence of its migration onto the property.[9] Tradition then voluntarily created a "tempo-

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[7] TEEB for Business, *The Economics of Ecosystems and Biodiversity* 5:26 (2010) (*The Economics of Ecosystems*), <https://goo.gl/UcBxZ2>.

[8] Tradition Homes Website, http://traditionms.com/.

[9] See *Columbus Communities, L.L.C.-Tradition Properties, Inc. Comments on Proposed Rule to Designate Critical Habitat for the Mississippi Gopher Frog* 2 (July 30, 2010) (noting that "there have been no reported sightings or evidence of migration of the Mississippi gopher frog into our community," yet "[w]e support the USFWS designation of critical habitat for the Mississippi gopher frog as proposed.").

rary no-development zone" adjacent to the pond where the critical habitat could be found, *id.* at 2. and then sold the land at market price to a land trust that would protect land surrounding the frog's breeding ground from development.[10] That allowed Tradition to make money selling valuable land for conservation purposes while maintaining the conservationist ethos it has used to market the property to buyers. And in doing so, Tradition proved Petitioner's dire forecasts about property-devaluing effects of critical habitat designation to be unfounded. Tradition is doing exactly the kind of residential development that Petitioner complains it might be prohibited from doing. And Tradition has not only found such development to be environmentally feasible, but profitable.

Still others, like amicus Jeff Alvarez, derive significant income from selling services that are necessary for species preservation. Jeff is a biological consultant who facilitates projects that might implicate the ESA. He also trains biologists all over the West on how to work with endangered species. Jeff and the other amici thus show in myriad ways that the modest costs imposed through the ESA's environmental regulations are frequently outweighed by the benefits of those regulations—including for those that bear the full weight of their regulatory impact. That belies the zero-sum picture being painted by the Petitioner and its amici.

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[10] Press Release, Center for Biological Diversity, *Conservation Groups, Developer Sign Agreement to Protect Endangered Mississippi Gopher Frog* (Mar. 8, 2012), <https://goo.gl/Cb8XkY>.

B. The Service's experts are an economic asset for many small-businesses.

Amici's experience also challenges another article of faith asserted by Petitioner and its amici: that the Service is staffed by zealots who will advance natural interests above human ones, whatever the costs, and are sure to prohibit any future development of the property given the chance. Pet. Br. 14. Respondent Center for Biological Diversity has already shown through empirical research that such distrust is wildly unjustified, because the outright development bans Petitioner fears "essentially never happen, and ... even substantial restrictions are a vanishingly rare exception." Ctr. for Bio. Diversity Resp. Br. 20 (citing Jacob Malcolm & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, 112 Proc. Nat. Acad. Sci. 15844, 15846 (2015)). To this data-based analysis, amici add their personal experience, which confirms the experts of the Service to be an asset, not a liability, to business owners—nothing like the obstructionist force portrayed by the Petitioner.

The ease of working with the Service was a great boon—and a complete shock—to Franziska "Francis" Schrabram, the owner of Rana Ranch in Calvares County, California. When an endangered California red-legged frog was discovered in 2006 by one of her neighbors, the discovery created an uproar in her conservative ranching community. Francis heard stories from neighbors that the Government would take her land and prevent her from ranching. Thus, when it came time to deal with Service officials, Francis was deeply concerned. But what she found upon engaging with the Service bore no resemblance to her neighbors' dire predictions. Her work

with the Service proved to be a very fruitful cooperation. Service officials made funding available under the ESA that allowed her to take on substantial projects she would not have been able to undertake on her own, including building fences, digging new wells, and habitat restoration. Now Rana Ranch has a conservation easement that, together with other improvements, has actually increased the ranch's profitability, while doing nothing to prevent ranching activities even on the portion of the ranch to which it applies. Francis has found the easement's rules to be so easy to understand and so manageable to follow that she plans to expand the conservation easement to the entire property. Her experience has even brought her neighbors around—one erstwhile skeptic applied for funding for his own conservation projects.

Susan Sorrels had a similarly positive experience with the Service when she sought to reintroduce the Amargosa vole on her property through her business: Shoshone Village, a tiny natural and historical attraction in the Mojave desert that abuts an incredible desert oasis with an enormous wetland. Susan participated in a Section 6 project under the Endangered Species Act with the Service and the California Department of Fish and Wildlife. She found that the state and federal officials she worked with were very protective of her interests, despite her eagerness to move the project along quickly to help the species. And the results of this collaboration speak for themselves. With the Service's expert guidance, the oasis has been significantly improved, the vole has been successfully reintroduced from a neighboring population, and Ms. Sorrels reports that her income has increased. Hers is now the most stable business in the area, and she is urging others to shift from mining to eco-

tourism to create a more sustainable economic base for the region.

Brett Baker found the collaboration he enjoyed with state and federal officials to be the most important part of his experiences with the ESA. Brett has encountered issues arising under the ESA multiple times over the communal levy system which serves his family's farm, and over the elderberry bushes on the farm that Service officials asked him to preserve for the Valley elderberry longhorn beetle. Brett even found the process inspirational, noting that while "Yes there are costs" posed by the Act's required consultations and other regulatory requirements, he found they were more than made up for through the benefits they provide to future generations. So positive was his experience that he could only conclude that, like him, "deep down, all farmers are environmentalists."

Finally, Mike Phillips of the Turner Endangered Species Fund, which works to preserve endangered species on private land, has noted that the flexible nature of the ESA's species protections makes it easy to work with Service officials. In Phillips' experience, the ESA can be—and is—administered in a way that protects business' profitability while still improving habitat and other protections for endangered species. This is because federal officials recognize there are lots of workarounds for economic conflicts, even if there are no workarounds for extinction. Because the officials of the Service put that idea into practice, amici have found that they are an asset that tilts the balance sheet further in favor of biodiversity regulation. Yet again, the horrors of Petitioner's imaginings are dispelled by amici's actual experiences.

C. Protection of biodiversity is also essential for the economy as a whole.

Petitioner and its amici miss something else with their complaints about the difficulty in quantifying immediate "monetary benefits from the designation" of the gopher frog's critical habitat. Pet. Br. 17. Many of the economic benefits of such efforts are much broader in scope than can be identified on a single business's balance sheet, and can only be measured by observing larger economic forces that take time to reveal themselves. Yet when they do, they prove to be extraordinarily powerful, creating virtuous cycles that positively impact the economies of entire regions—indeed, entire countries.

A perfect example of this phenomenon is the Yellowstone Valley, where protection of the integrity of the Greater Yellowstone Ecosystem is not merely good ecology, but has proven "a crucial element in any economic development strategy for the region." Thomas Michael Power, *Ecosystem Preservation and the Economy in the Greater Yellowstone Area*, 5 Conserv. Bio. No. 3 at 395 (Sept. 1991) (*Ecosystem Preservation*). When wolves were returned to the Yellowstone National Park, for instance, it produced effects that lifted the region's entire economy. The wolves attracted more visitors to the park, bringing in an additional $35 million in tourist revenue—double that once the money filtered through the local economy. John Duffield et al., *Wolves and People in Yellowstone: Impacts on the Regional Economy* 6 (Univ. of Montana Working Paper Sept. 2006), <https://goo.gl/B4ErY6>. And economists observed that such efforts to make the area more environmentally attractive have produced feedback effects that made economic conditions even more favorable. People greatly

value higher-quality living environments, and will make "major commitments of resources," and will endure "significant sacrifices in terms of potential money income and the range of commercial opportunities" in order to enjoy them. *Ecosystem Preservation* 396. When people relocate to pursue high-quality environments, it creates "an available supply of labor at relatively low cost." Thomas Michael Power, *Lost Landscapes and Failed Economies* 16 (1996). Once introduced into the system, this enhanced regional labor pool stimulates economic activity and injects further capital into the local economy. *Ibid.*

The ESA's regulatory protections do more than provide economic opportunity, however. They also stave off economic collapse. This is because the cornerstones of the world's economy all rest on a living fabric of interconnected organisms. Biodiversity contributes over $190 billion annually in insect pollinators necessary to sustain agriculture. *The Economics of Ecosystems*, *supra* note 7, at 2:16. And between 25 and 50 percent of the $825 billion pharmaceutical market is derived from biologically supplied sources. *Id.* at 5:13. From cancer treatments that come from yew trees and periwinkle flowers, to diabetes therapies obtained from Gila monsters, many of our life-sustaining advances come from, and depend on, the availability of natural sources. *Economic Benefits of the ESA*, *supra* note 5, at 2.

And biodiversity does even more. It contributes positively in innumerous ways to human physical and mental health, provides erosion control, carbon storage, and sequestration, and provides resilience to large-scale disturbance and environmental change. *The Economics of Ecosystems*, *supra* note 7, at 2:6, 6:8, Annex 2.1; *Economic Benefits of the ESA*, *supra* note 5, at 2.

The sheer tonnage of economic value the nation receives from assets traceable to a biodiverse world is staggering. "The economic value of terrestrial nature's contributions to people in the Americas is estimated to be at least $24.3 trillion per year."[11] That equals the Americas' gross domestic product. *Ibid.*

The interdependent nature of our biodiverse world means that each part of the ecosystem—even the humble dusky gopher frog—contributes to those baseline economic needs. Each loss of an endangered species is thus an irreplaceable blow to the balance in our collective resource bank. And species-loss can be more than simply a gradual depletion of the account. It can also result in a catastrophic run on the bank.

For instance, during China's rapid economic expansion from 1949-1981, China significantly depleted its natural forests in order to meet voracious timber demand. This rapid deforestation reduced timber stocks, tilted forests toward younger, weaker trees, and compromised soil conservation and watershed protection. *The Economics of Ecosystems supra*, note 7, at 2:20. Things reached a tipping point in 1997, when severe droughts caused the lower reaches of the Yellow River to dry up for 267 days. A year later, that drought gave gave way to major flash flooding. *Ibid.* The result was $30 billion in damages, the loss of 4,150 human lives, and the displacement of millions of people. *Id.* at 220, Annex 2.1. The lesson from this episode is simple: Petitioner can complain

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[11] IPBES, *The Regional Assessment Report on Biodiversity and Ecosystem Services for the Americas: Summary for Policymakers* 10 (2018), <https://goo.gl/Lyo6FV>.

all it wants about the difficulty of quantifying distinct benefits of species conservation. But it cannot ignore that the failure to protect species is a sure path toward a catastrophic destruction.

II. The Service's broad, flexible authority to designate potentially habitable land as critical habitat is essential to protect endangered species.

Congress recognized this intertwining between our fate and that of our natural world when it crafted the ESA's provisions for designating critical habitat in 16 U.S.C. §§ 1532(5)(A), (B) and 1533(a)(3)(A)(i). In those provisions, Congress required species loss to be combatted "whatever the cost," *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 184 (1978). This is because each species' contributions to the world—from its innate existence appreciated only by nature-lovers, to the economic contributions as "potential resources" that even hard-nosed capitalists can understand, Report of the Committee on Merchant Marine and Fisheries, H.R. Rep. No. 93–412, pp. 4–5 (1973)—have "'incalculable' value." 437 U.S. at 188-89, quoting H.R.Rep.No.93–412, pp. 4–5 (1973)).

Congress likewise recognized that the worse the plight of the threatened species, the greater flexibility the Service would need to thwart its extinction. That is why flexibility is written into the designation process. Congress gave the Service the option to go beyond areas actually occupied by the endangered species in designating its critical habitat. Under Section 3(5)(A)(ii), critical habitat can extend into areas "outside the geographical area occupied by the species," because the occupied areas might be so compromised, small, or isolated that they will not support recovery by themselves. The need for flexibility to conserve species also motivated Congress to

strip Section 3(5)(A)(ii) of many of the conditions required for a designation of occupied habitat under Section 3(5)(A)(i), which is restricted to areas that contain the "physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). Those provisions are conspicuously missing from Section 3(5)(A)(ii), and their absence is no accident. Removing these restrictions empowered the Service to consider a broader range of options for potential habitat to designate, to maintain the flexibility necessary to combat the limitless variety of extinction threats that might exist, whatever their source. The validity of designations under Section 3(5)(A)(ii) are thus subject to only a single, overriding requirement: whether they "are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Species conservation is thus all that really matters.

Congress similarly put species-survival first in the restrictions it placed on the Service's authority to *exclude* areas from critical habitat—putting a hard stop on consideration of any "economic impact" of designation if "the failure to designate critical habitat will result in extinction of the species concerned." 16 U.S.C. § 1533(b)(2). That blocks the Service from prioritizing *anything* else—such as the economic burdens of the regulation—if doing so would lead to species extinction. Congress recognized that anything less would allow the paramount economic benefits of the species to be irretrievably lost.

There is no real question that the Service stayed within the broad boundaries of its designation authority here, because the designation of Unit 1 meets the only standard required under the ESA: It is "essential for the

conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service determined, in consultation with a panel of scientists, that focusing solely on the frog's current habitat would not adequately protect against extinction. Ctr. For Bio. Diversity Resp. Br. 9-10. That is because relegating the dusky gopher frog's protected critical habitat to the single area of Southwest Mississippi where it is presently found would leave the frogs vulnerable to threats—from invasive species, drought, and disease—that could wipe out the entire species with a single blow, and are "likely to occur at the same time at sites near each other." J.A. 52-53, 125.

That unacceptable risk made designation of *some* unoccupied land "essential to conserve the species" under Section 3(5)(A)(ii). The Service could not simply do nothing. So the Service picked Unit 1 because it was the best available option—even if it was not a perfect option. Ctr. for Bio. Diversity Resp. Br. Resp. Br. 11. The destruction of the frog's habitat through urbanization, flood control, agriculture, and timber foresting left very few options available. *Id.* at 8.

Tellingly, Petitioner does not quarrel with any of the scientific judgments that went into the designation of Unit 1. Nor does it contest that the frog cannot survive in its current habitat. Instead, it simply suggests that we must accept the species' extinction for its own economic expediency—and it arrives at that conclusion through a combination of reading provisions into the statute that Congress specifically stripped out, and by implying a requirement that courts engage in exactly the types of explicit cost-benefit calculus that Congress explicitly forbade the agency from doing. But as the Center for Biological Diversity has already explained, Congress did not

permit endangered species to be traded away so easily. And the significant economic benefits that could be earned in spite of—or because of—the modest restrictions the Service imposed, as well as the need to protect biodiversity to ensure our long-term survival, require that Petitioner's reading be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Turner Endangered Species Fund – The Turner Endangered Species Fund was founded by Ted Turner and Mike Phillips, currently a Montana state legislator. The Fund works on restoring individual species as well as functional ecosystems on private land.

Jeff Alvarez – Jeff Alvarez is a biological consultant who provides services for companies seeking approval for projects which would affect endangered species and their habitat.

Brett Baker – Brett Baker is a sixth-generation farmer in California who sees protection of endangered species as a component of protecting the water supply which is the lifeblood of his family farm.

David Bugni – David Bugni and his family own a private forest in Oregon that utilizes sustainable forestry techniques and has carried out stream restoration projects on their property to help endangered salmon species as well as their forest.

Cascade Caverns – This small business is owned by Lance Kyle. The business operates cave tours in the Texas Hill Country and relies significantly on several endangered species found in the caves and on the surrounding private property.

Connolly Ranch – Connolly Ranch is a family ranch in California that has protected habitat for endangered species while operating a profitable ranching business.

Hawaiian Birds, LLC – This small business is owned and operated by Jack Jeffrey. Hawaiian Birds, LLC operates bird watching tours and sells photographs of Hawaiian wildlife, including several endangered species.

Rick Lamplugh – Rick Lamplugh is a best-selling and award-winning author who lives in Gardiner, Montana, in order to be close to the endangered species that inspire his work, such as grizzly bears and wolves.

LoveTree Farmstead – LoveTree Farmstead in Northern Wisconsin is a sheep dairy farm and maker of artisanal cheeses, operated by Mary Falk and her family.

Ray McCormick – Ray McCormick is a soybean and corn farmer in Indiana and Illinois who operates his profitable farm alongside migratory birds and other endangered species.

Susan Middleton – Susan Middleton is a wildlife photographer, author, and educator who focuses on wildlife issues, including endangered species.

Roger Peet – Roger Peet is an artist who creates murals around the country, many focusing on themes of endangered species and their protection.

Rana Ranch – Rana Ranch is a cattle ranch in Calaveras County, California that is operated by Franziska Schabram. Rana Ranch worked with state and federal officials to protect habitat for an endangered species while still operating a profitable cattle ranch on land subject to a conservation easement.

Shoshone Village – Shoshone Village is a tourist operation in the Mojave Valley of California owned by Susan Sorrels. The property includes a desert oasis that is being rehabilitated to be habitat for endangered species

but which also is a magnet for tourists to the area.